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In The

Supreme Court of the United States

BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF
THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on BEHALF of GILBERT F., a MINOR CHILD,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF *AMICUS CURIAE* NEW YORK STATE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New York State School Boards Association, Inc. ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. Its membership consists of approximately ninety-two percent (92%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of the affairs and projects of New York's public school districts. NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting public schools, including the education of children with disabilities, and indeed did so in the court below. NYSSBA fully supports the rights of disabled children. However, NYSSBA has a significant interest in ensuring that its members are not subjected to obligations related to the education of children with disabilities that exceed those specifically set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"). Special education services are costly[2], and federal financial

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than the *Amicus*, its members or counsel made a monetary contribution to the preparation or submission of this brief.

[2] An examination of the most recent available data contained within The New York State School Report Card that school districts in New York must submit to the New York State Education Department reveals that during the 2003-04 school year, the average expenditure of all public schools in New York State for special education was $17,667 as compared to $8,177 for general education students. During the 2004-05 school year those figures increased to $19,320 for special education

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assistance made available by the IDEA is insufficient to cover the cost of special education. NYSSBA members, like many other school districts across this country, regularly expend often scarce local financial and other resources to fully comply with their IDEA obligations, which frequently limit the type of educational choices they can afford to offer their students, including children with disabilities. A decision by this Court in favor of the respondent would impose an added financial liability on school districts that would limit the educational choices NYSSBA members could afford to offer all of their students.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether 20 U.S.C. §1412(a)(10)(C)(ii) limits the availability of tuition reimbursement as a remedy under the IDEA only to parents of children with disabilities "who previously received special education and related services under the authority of a public agency. . . ." When asked the same question, the U.S. Court of Appeals for the Second Circuit, whose decision in *Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 193 Fed. Appx. 26 (2nd Cir. 2006), is on appeal herein, answered no.

This Court first recognized a parent's right to tuition reimbursement under the IDEA in its 1985 decision in *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S.

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and $8,787 for general education students. The most recent student count data available from the New York State Education Department further indicates that on December 1, 2005 there were a total of 407,000 school age children ages 4-21 receiving special education programs and services.

359 (1985), based on the statute's grant of authority to courts to award "such relief as the court determines is appropriate" under section 1415(e)(2), currently codified at 20 U.S.C. §1415(i)(2)(C)(iii). It later expanded this right in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), ruling that a parent's choice of a private school that does not meet state educational standards does not impede the ability to obtain such relief.

In the time since, Congress has reauthorized the IDEA twice, first in 1997 and, more recently, in 2004. During the 1997 reauthorization, Congress amended the IDEA to explicitly provide a statutory right to reimbursement (20 U.S.C. §1412(a)(10)(C)). Nothing in the 2004 reauthorization materially affects that right.

The language at issue herein first appeared in the 1997 version of the IDEA within a paragraph entitled "Children in Private Schools" (20 U.S.C. §1412(a)(10)). It is part of a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency" (20 U.S.C. §1412(a)(10)(C)). That subparagraph further addresses the topics of "Reimbursement For Private School Placement" (20 U.S.C. §1412(a)(10)(C)(ii)), and "Limitation On Reimbursement" (20 U.S.C. §1412(a)(10)(C)(iii)). The 2004 reauthorization did not change this statutory structure.

The plain text of the contested language and its contextual framework make clear that the previous receipt of special education and related services under the authority of a public agency is a condition precedent to the recovery of reimbursement as a remedy under the IDEA when a school district fails to make a FAPE available. The limitation constitutes a proper exercise of congressional

authority and discretion to determine who may benefit from its laws.

Even if the language of 20 U.S.C. §1412(a)(10)(C)(ii) is deemed to be ambiguous, further support for a literal interpretation thereof is found in the history of its incorporation into the IDEA. That history clearly establishes a congressional intent, continued in the 2004 reauthorization, to restrict and refine the IDEA rights of children unilaterally enrolled by their parents in private school, and the rights of their parents.

The decision of the Second Circuit in this case should be reversed.

ARGUMENT

I. Under The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) A Parents' Right To Reimbursement Under The IDEA Depends On Both A School District's Failure To Make A FAPE Available And Their Child Having Previously Received Special Education And Related Services Under The Authority Of A Public Agency.

The IDEA provisions that set forth a parent's statutory right to reimbursement under that law read, in relevant part, as follows:

> (C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY

> (i) IN GENERAL – Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child in such private school or facility.
>
> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT – If the parents of a child with a disability, **who previously received special education and related services under the authority of a public agency**, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment (20 U.S.C. §1412(a)(10)(C)(i),(ii)) (emphasis added).

The bolded text highlights the specific language in controversy. First introduced during the 1997 reauthorization of the IDEA, the above quoted provisions were unchanged by the 2004 reauthorization.

Last year, this Court explained in *Arlington Central Sch. Dist. Board of Educ. v. Murphy*, that it must be presumed the language of the IDEA expresses what Congress intended it to say, and means what it says (126 S.Ct. 2455, 2459 (2006)). This Court has also held that, generally, statutory words are to be given the natural meaning commonly attributed to them (*see, e.g., Caminetti v. United States*, 242 U.S. 470, 485-86 (1917)). An

exception would apply if the plain language of a statute is susceptible to more than one meaning (*Id.* at 485), or if the disposition required by the statutory language is absurd (126 S.Ct. at 2459). Otherwise, the policy choices articulated by Congress in the language of a statute must be upheld, regardless of their wisdom (*Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548-49 (1983); *Harris v. McRae*, 448 U.S. 297, 326 (1980)).

According to the Second Circuit, whose decision is the subject of the appeal before this Court, the language of 20 U.S.C. §1412(a)(10)(C)(ii) is not only ambiguous but also inconsistent with the overarching purpose of the IDEA and other provisions of the statute. For the reasons that follow, the *Amicus* respectfully disagrees and urges this Court to reverse the Second Circuit's decision and enforce the plain language of the statute.

A. The Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Is Not Ambiguous.

According to the Second Circuit, the language at issue herein is ambiguous because it "does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services" (*Frank G. v. Board. of Educ. of Hyde Park*, 459 F.3d 356, 368 (2nd Cir. 2006)).[3] However, the absence of

[3] On appeal before this court is the Second Circuit's ruling in *Board of Educ. of City School Dist. of City of New York v. Tom F.*, 193 Fed. Appx. 26 (2006). However, as indicated in that decision, the basis for the Second Circuit's *Tom F.* ruling is articulated in a separate

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such restrictive language does not preclude enforcement of the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) (*see Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-8 (2000)). That would be the case, particularly where, as here, the natural reading of a statutory provision is plainly discernable from both the common meaning of its words and its contextual features (*Id.*).

First incorporated into the IDEA during the 1997 reauthorization of the statute, the contested language appears in a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency," (20 U.S.C. §1412(a)(10)(C)). Moreover, it is part of a paragraph that expressly sets forth the rights of "Children in Private Schools" (20 U.S.C. §1412(a)(10)).

It is without question that the statutory framework within which Congress incorporated the statutory language at issue herein defines both the right of children in private schools to receive IDEA services and the right of parents who unilaterally place their children in private school to obtain tuition reimbursement as a remedy under the statute. 20 U.S.C. §1412(a)(10)(C)(ii) must be read within this larger structure, rather than in isolation. From that view, the language at issue herein makes clear that a parent's right to recover reimbursement as a remedy under the IDEA depends both on a district's failure to make a FAPE available, and their child's previous receipt

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decision by that court entitled *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356 (2nd Cir. 2006), which also required the Second Circuit to interpret 20 U.S.C. §1412(a)(10)(C)(ii).

of special education and related services under the authority of a public agency.

B. The Limitation Imposed By 20 U.S.C. §1412(a)(10)(C)(ii) On A Parents' Right To Reimbursement Is A Proper Exercise Of Congressional Authority.

As this Court has observed on more than one occasion, the IDEA is a funding statute (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2458; *Schaffer v. Weast*, 126 S.Ct. 528 (2005)). It provides federal financial assistance for states and local educational agencies that comply with various requirements designed to secure a FAPE for children with disabilities (*Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982); *see* 20 U.S.C. §§1412; 1413). Some of those requirements establish rules for the identification, evaluation and educational placement of children with disabilities (20 U.S.C. §1414), and provide for procedural safeguards that protect the rights of disabled children and their parents under the statute (20 U.S.C. §1415).

It is without dispute that Congress has the authority to set and revise the terms upon which it will make federal financial assistance available under its various laws, including the IDEA (126 S.Ct. at 2459). Furthermore, it is within the discretion of Congress to determine who will benefit from the "largesse" of its laws (*see*, *Regan v. Taxation with Representation of Washington*, 461 U.S. at 548-49; *Harris v. McRae*, 448 U.S. at 326).

The limitation on a parent's right to reimbursement at issue herein is but one of several changes first instituted

by Congress during the 1997 reauthorization that redefined the IDEA rights of children attending private school. For example, prior to the 1997 reauthorization, the IDEA addressed the subject of children with disabilities in private schools in a subsection that set out the REQUISITE FEATURES that needed to be included in the plan that states meeting the IDEA's eligibility requirements must submit to the Secretary of Education (*former* 20 U.S.C. §1413(a)). One of the paragraphs in that subsection required that states:

> (4) Set forth policies and procedures to assure –
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and
>
> (B) that –
>
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State, and

> (ii) in all such circumstances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies (*former* 20 U.S.C. §1413(a)(4)).

The 1997 reauthorization removed the above provisions and placed them in a new section regarding state eligibility requirements, and incorporated them with some changes within a new paragraph entitled "Children in Private Schools" that remains codified at 20 U.S.C. §1412(a)(10) under the current IDEA as reauthorized in 2004. Whereas, the 1997 reauthorization left the text of *former* section 1413(a)(4)(B) virtually unchanged, it amended the text of *former* section 1413(a)(4)(A) so as to impose limitations that restricted the availability of IDEA services to students unilaterally enrolled by their parents in private school to a proportionate share of funds made available by the IDEA. Those amendments read as follows:

> (A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS – (i) IN GENERAL – To the extent consistent with the number and location of children with disabilities in the State who are enrolled **by their parents** in private elementary and secondary schools, provision is made for the participation of **those** children in the program assisted or carried out under this part by providing for such children special education and related services **in accordance with the following requirements, unless the Secretary has arranged for services for those children under subsection (f):**

> **(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.**
>
> **(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law** (*former* 20 U.S.C. §1412(a)(10)(A)(i)) (emphasis added).

From its early beginnings, the IDEA reflects a history of statutory evolution and adjustment to congressional policy regarding the education of children with disabilities (*see*, *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. at 191-92). At every step, that evolution has been informed by specific findings set forth in the statute itself, and the national experience regarding implementation of previous requirements (*see*, S. Rep. 105-17, *5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)). Each of its reauthorizations has changed prior IDEA requirements.

The limitation on the availability of IDEA services for children in private school and the limitation on a parent's right to reimbursement at issue are part of that evolution. They constitute a departure from prior law, but also represent the articulation of congressional policy regarding the benefits available under the IDEA and the recipients of those benefits. That policy is within the discretion of Congress and must be upheld irrespective of its wisdom (*Regan v. Taxation with Representation of Washington*, 461 U.S. at 548-49 (1983); *Harris v. McRae*, 448 U.S. at 326 (1980)).

C. Enforcement Of The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Will Not Produce An Absurd Result.

According to this Court, a literal application of otherwise plain statutory language will not be appropriate if the disposition required by its terms is deemed absurd because it "will produce a result demonstrably at odds with the intentions of the drafters" (*United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 242 (1989)). However, that is not the case herein. As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) is part of a larger statutory framework defining the IDEA rights of children in private schools and their parents. Its enactment constituted a proper exercise of congressional authority and discretion regarding who may benefit from federal laws, and the terms and conditions applicable to the receipt of those benefits.

According to the Second Circuit a literal application of 20 U.S.C. §1412(a)(10)(C)(ii) would force parents to acquiesce to an inappropriate placement to preserve their right to reimbursement. However, as noted by the district court in this case, the statutory language at issue herein initially "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate" (*Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005)). As discussed below, the legislative history of 20 U.S.C. §1412(a)(10)(C)(ii) supports the district court's conclusion. Its adoption was part of an effort by Congress to resolve the problem of escalating litigation (S. Rep. 105-17, *13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)). Nothing precludes Congress from addressing within the statute fiscal considerations

associated with the implementation of the IDEA (*see Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2463).

II. The History Of 20 U.S.C. §1412(a)(10)(C)(ii) Supports Enforcement Of Its Plain Language.

As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) was first incorporated into the IDEA during the 1997 reauthorization of the statute. From the beginning, primary concern of the IDEA has been to ensure the availability of a FAPE to all children with disabilities. But the 1997 reauthorization marked a change in emphasis directed at ensuring greater access to the general curriculum and that efforts to educate disabled children are effective.

As indicated by accompanying Senate and House Reports, Congress viewed the 1997 reauthorization "as an opportunity to review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality education . . . " (S. Rep. 105-17, *5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)).

One of the ways in which the 1997 reauthorization was expected to realize that opportunity was by "assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities . . . " (*Id.*). Another was "to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools" and yet another to "resolve a number of issues that [had] been the subject of an increasing amount of litigation in the last few years" (S. Rep. 105-17, *13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)).

It is beyond dispute that, ever since this Court's *Burlington* decision, litigation over tuition reimbursement has comprised a significant number of special education cases. Neither can it be disputed that the cost of litigation in addition to the actual reimbursement of tuition can significantly drain the limited resources available to school districts to ensure that children with disabilities not only have access to a FAPE, but also can achieve a quality education. Thus, it was appropriate for Congress to address these problems within the IDEA itself. As this Court has indicated, "[t]he IDEA ... does not seek to promote [its over-arching] goals at the expense of all other considerations, including fiscal considerations" (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2463). The contested language was specifically designed to curtail a proliferating cost problem that impedes a school district's ability to maximize the use of limited federal funds needed to adequately educate disabled children.

The consequences of enforcing the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) might be viewed by some as severe. But they are no less harsh than those imposed by contemporaneously enacted limitations on the right of children with disabilities unilaterally enrolled by their parents in private schools to participate in programs assisted or carried out under the IDEA.

Notwithstanding the IDEA's overarching goal of ensuring that all children with disabilities have access to a FAPE, the 1997 reauthorization provided at 20 U.S.C. §1412(a)(10)(A)(i) that the amount of IDEA funds school districts must expend for the provision of services to children unilaterally enrolled by their parents in private school is limited to a proportionate share of those funds. Federal IDEA regulations adopted to implement the 1997

reauthorization further specified that children with disabilities unilaterally enrolled by their parents in private school have no individual right to some or all of the services they would receive if enrolled in a public school (*former* 34 C.F.R. §§300.454(a)(1); 300.455(a)(2),(3)). Neither do they have an individual right to a due process hearing to challenge any of the services the public school actually offers (*former* 34 C.F.R. §300.457). Instead, decisions about which children will receive services and what services will be provided to them are made by public school officials in consultation with representatives of private school children with disabilities (*former* 34 C.F.R §300.454(a)(2), (b), (c)). Complaints about the services provided are filed with the state educational agency (*former* 34 C.F.R. §300.457). The 2004 reauthorization and its implementing regulations continue the 1997 statutory and regulatory scheme (20 U.S.C. §1412(a)(10)(A)(iii); 34 C.F.R. §§300.130-300.150).

Thus, it is clear that the history of its incorporation into the IDEA requires the statutory language at issue herein be upheld and enforced. The decision of the Second Circuit should be reversed. A contrary result would contravene the plain language of the statute and the intent of its drafters. It also would negatively affect the ability of school districts to provide appropriate educational opportunities to all of their students.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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